LAW OFFICES

FISHER, WAYLAND, COOPER AND LEADER

1255 TWENTY-THIRD STREET, N.W.

SUITE 800

WASHINGTON, D. C. 20037-1170

TELEPHONE (202) 659-3494

TELECOPIER (202) 296-6518

WRITER'S DIRECT NUMBER

(202) 775-3788

COPY

October 25, 1991

VIA HAND-DELIVERY:

[redacted]

ASSIGNMENT AND USE AGREEMENT

THIS ASSIGNMENT AND USE AGREEMENT, dated as of September 13, 1991, between Chesapeake Television, Inc., a Maryland corporation ("CTI"), and Chesapeake Television Licensee, Inc., a Delaware corporation ("Chesapeake Licensee").

WHEREAS, CTI holds the license (the "Baltimore License") issued by the Federal Communications Commission (the "FCC") to operate television station WBFF-TV in Baltimore, Maryland (the "Baltimore Station");

WHEREAS, CTI and Chesapeake Licensee Licensee wish to enter into this Agreement in order (i) to provide, subject to FCC consent, for the assignment of the Baltimore License by CTI to Chesapeake Licensee;

WHEREAS, CTI owns One Hundred Percent (100%) of the issued and outstanding shares of Chesapeake Licensee and

of the Baltimore Station to Chesapeake Licensee. The Assignment Date shall be a date following FCC approval of the assignment contemplated hereunder, which date is mutually acceptable to the parties hereto and on which date such assignment shall occur.

2. CTI shall manage and direct day-to-day operations of the Baltimore Station, including, but not limited to, providing staffing, selling advertising time, operating and maintaining the business, and assuring compliance with FCC requirements. CTI shall maintain the business and hire and supervise such employees as are necessary to the fulfillment of its responsibilities hereunder. It is understood that all expenses and capital costs incurred in operating the Baltimore Station and the business shall be paid by CTI and all advertising and other receipts collected in operating the Baltimore Station shall be retained by CTI. CTI shall not be entitled to any compensation for services rendered hereunder.

4. CTI shall at all times exercise ultimate control over the programming personnel, operations, maintenance, and policies of the Baltimore Station, and CTI shall operate the Baltimore Station in compliance with the rules, regulations, and policies of the FCC.

5. All notices between the parties shall be (i) in writing, (ii) delivered by personal delivery, or sent by commercial delivery service or by registered or certified mail, return-receipt requested or sent by telecopy, and (iii)

addressed as follows or to such other address as either party may specify from time to time:

IF SENT TO CTI
OR Chesapeake Licensee: Mr. David D. Smith
c/o Sinclair Broadcast Group, Inc.
2000 W. 41st Street
Baltimore, Maryland 21211

COPIES TO: Steven A. Thomas, Esquire
Moore, Libowitz & Thomas
300 N. Charles Street, 5th Floor
Baltimore, Maryland 21201

Martin R. Leader, Esquire

licenses for the Baltimore Station; it being understood that prior to the assignment of the licenses for the Baltimore Station or the transfer of control of Chesapeake Licensee, the prior consent of the FCC will be obtained with respect thereto.

7. This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland.

8. It is the intent of the parties that operation of the Baltimore Station and the transactions under this Agreement comply with the Communications Act, and all provisions of this Agreement shall be construed consistently with such Act.

9. If any provision of this Agreement shall be declared void or invalid by any governmental authority with jurisdiction thereof, then the remainder of this Agreement shall remain in full force and effect without the offending provision, provided that such remainder substantially reflects the original agreement of the parties.

10. This Agreement represents the entire understanding of the parties hereto with respect to the subject matter hereof and may be amended only by a writing signed by both parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed and delivered the day and year first above written.

CHESAPEAKE TELEVISION, INC.

By: _____
Name: David D. Smith
Title: President

CHESAPEAKE TELEVISION LICENSEE, INC.

By: _____

EXHIBIT G

DECLARATION

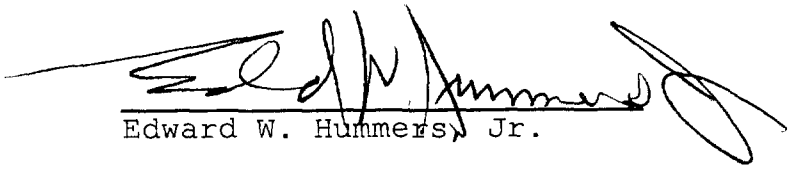
I, Edward W. Hummers, Jr., am a partner in the law firm of Fletcher, Heald & Hildreth. I am communications legal counsel to Nationwide Communications Inc., the licensee of FM station WPOC, Baltimore, Maryland.

By letter of December 5, 1991, I transmitted to the Federal Communications Commission, via Pittsburgh, an application FCC Form 301 to report a decrease in the height of the antenna supporting structure upon which the WPOC antenna is mounted. That application was assigned file number BPH-911206IF.

The timing of the filing of the application was precipitated by an FCC Baltimore Field Office inspection by EIC Robert Mroz of the WPOC transmitter site on October 24, 1991. On that date, I was called by Ms. Jennifer Grimm and Mr. Michael Fast, the General Manager and Chief Engineer of WPOC, respectively, and advised that FCC personnel had visited the WPOC transmitter site that day for the purpose of verifying the coordinates of the tower location and the height of the center of radiation of the WPOC antenna. It was noted by the FCC personnel that the tower height was less than that shown on documentation which they possessed and that no antenna was visible above the top plate of the tower which was 666 feet above ground. The height of the tower was determined by counting tower sections.

On October 28, 1991, I advised Donald E. Watkins, Nationwide's Vice President - Engineering, that Section 73.1690(b)(1) required the filing of an FCC Form 301 for any change in the overall height of an FM antenna structure. Thereafter, pursuant to Mr. Watkins' request, I prepared the necessary application and, on November 22, 1991, I transmitted it to him for review and signature. The application was filed with the FCC on December 5, 1991.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of May, 1993.



Edward W. Hummers, Jr.

EXHIBIT H

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:
1800B3-TT

10 SEP 1992

Donald E. Watkins
Nationwide Communications Inc.
Radio Station WPOC(FM)
One Nationwide Plaza, 27th Floor
Columbus, OH 43216

Re: WPOC(FM), Baltimore, MD

Mr. Kenneth C. Howard, Jr.'s February 19, 1992 letter states that Cunningham's competing application (BPCT-910903KE) falsely claims that the tower currently has an OHAMSL of 381 meters.

Your attorney's February 27, 1992 letter states that Mr. Leader does not represent Nationwide Communications Inc. and that Mr. Leader's February 11, 1992 letter should not be considered an amendment to WPOC(FM)'s pending application.

Due to the 12 meter discrepancy in the OHAGL and the OHAMSL, Nationwide Communications, Inc. must provide a statement from a licensed surveyor verifying the tower's overall height above ground level and above mean sea level. Further action on the subject application will be withheld for a period of thirty days from the date of this letter to provide you an opportunity to reply. Failure to respond within this period will result in the dismissal of the application pursuant to 47 C.F.R. § 73.3568(b). Please note that any amendment must be submitted to the Office of the Secretary in triplicate and signed in the same manner as the original application.

Sincerely,

Robert D. Swanberg

for Dennis Williams
Chief, FM Branch
Audio Services Division
Mass Media Bureau

cc: Fletcher, Heald & Hildreth
Fisher, Wayland, Cooper & Leader (Cunningham Communications, Inc.)
Baker & Hostetler (Scrips Howard Broadcasting Company)
EIC, Baltimore

EXHIBIT I

inappropriate for the following reasons: All of my assumptions regarding the characteristics of the tower structural system are based on exhaustive study of the structure through personal observations with the use of high power binoculars, high power surveying instruments, large number of photographs taken from short distance with high power lenses, thirty years of experi-

EXHIBIT J

NEWTON A. WILLIAMS
THOMAS J. RENNER
WILLIAM P. ENGLEHART, JR.
STEPHEN J. NOLAN *
ROBERT L. HANLEY, JR.
ROBERT S. GLUSHAKOW
STEPHEN M. SCHENNING
DOUGLAS L. BURGESS
ROBERT E. CAHILL, JR.
LOUIS G. CLOSE, III
E. BRUCE JONES * *
GREGORY J. JONES
J. JOSEPH CURRAN, III

*ALSO ADMITTED IN D.C.
**ALSO ADMITTED IN NEW JERSEY

LAW OFFICES
NOLAN, PLUMHOFF & WILLIAMS
CHARTERED
SUITE 700, COURT TOWERS
210 WEST PENNSYLVANIA AVENUE
TOWSON, MARYLAND 21204-5340
(410) 823-7800
TELEFAX: (410) 296-2765

JAMES D. NOLAN
(RETIRED 1990)
J. EARLE PLUMHOFF
(1940-1988)
RALPH E. DEITZ
(1918-1990)
OF COUNSEL
T. BAYARD WILLIAMS, JR.
RICHARD L. SCHAEFFER*

WRITER'S DIRECT DIAL
823- 7853

January 28, 1992

Arnold Jablon, Esquire
Director
Office of Zoning Administration
and Development Management
County Office Building
Towson, Maryland 21204

Mr. John Reisinger
Chief Building Engineer for
Baltimore County Department
of Permits and Licenses
County Office Building
Towson, Maryland 21204

Re: Request for Advisory Opinion Letter and Investigations

Gentlemen:

We serve as special counsel to Scripps Howard Broadcasting Company, the licensee of television station WMAR-TV in Baltimore, Maryland. In that connection, it has come to our attention that recently, Four Jacks Broadcasting, Inc. ("Four Jacks") has petitioned the Federal Communications Commission for a construction permit for Channel 2 in Baltimore. If the authorization were to be approved by the Commission, Four Jacks would use and operate a 666 foot, guyed tower that is located in the northwest quadrant of Route 40 West and North Rolling Road, known as 1200 North Rolling Road, Catonsville, Maryland. The tower's presence is based upon three known cases that a diligent search has disclosed, namely: Case No. 69-269RX: Case No. 75-181X; and Case No. 77-122SPH. Case No. 77-122SPH allowed an extension to 1009 feet, but this 15 year old special exception has never been utilized, and accordingly has lapsed under Section 502.3 of the Regulations. Nonetheless, a review of Four Jacks' application before the Federal Communications Commission indicates that they might need to increase the height of the tower.

It is our opinion that any increase in height over the present 666 feet would require: 1) A full County Review Group (CRG) meeting under the new rules and method; 2) A special hearing/special exception under all the tower rules in the Zoning Regulations and Development Regulations; and 3) Compliance with all state and federal requirements including

In addition to our review of tower height and zoning issues, a consultant was retained to evaluate the safety and structural integrity of the existing tower. A copy of the consultant's report by Vlissides Enterprises, dated January, 1992, is enclosed for your information. You will note that the consultant has concluded that "the tower legs are overstressed on the lower and upper 200 feet of the tower by as much as 140%" and that it is their expert opinion that due to the large overstress that is calculated in the tower legs "the subject tower is not adequately designed to support the Channel 2 antenna and its transmission lines...."

Furthermore, the consultant noted that significant icing of the tower and its guy cables, in addition to the wind loading capacities specified for Baltimore County will put the tower and the surrounding area in danger. Not only is the tower very close in proximity to residential areas, but also to a shopping center (tax map 94, p.106) and the Jehovah Witnesses property (tax map 94, p.114). In summary, according to the experts' findings, the present tower is overstressed and very possibly unsafe and cannot support any additional new transmitting facilities.

Since the tower's safety and integrity are of the utmost concern to the public health, safety and welfare, and since innocent people on adjoining properties could be at risk, we ask that your Department and the Building Engineer immediately conduct an investigation.

Finally, we include a $35.00 zoning consultation fee to confirm the CRG and zoning approvals or special exception/special hearing requirements, under all current regulations and compliance with all state and federal requirements, including environmental regulations. An early reply will be appreciated.

Very truly yours,

Stephen J. Nolan

SJN/mao

enclosure (Vlissedes Report, January 1992)

cc: Baltimore County Zoning Commissioner
Mr. William Hughey
Area Planner, OPZ

EXHIBIT K

commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute. The Commission has the statutory obligation "periodically [to] review and revise" the guidelines in light of its consultation with authorities on and representatives of the federal criminal justice system. See 28 U. S. C. § 994*(o)*. The Commission also must "revie[w] the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement," *Mistretta* v. *United States*, *supra*, at 369–370, with respect to every federal criminal sentence. See 28 U. S. C. § 994(w). In assigning these functions to the Commission, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U. S. ___, ___ (1991) (slip op., at 4). Although amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, if the guideline which the commentary interprets will bear the construction. Amended commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today.

It is perhaps ironic that the Sentencing Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary. The commentary to the guideline on commentary provides:

> "[I]n seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." USSG § 1B1.7, comment.

We note that this discussion is phrased in predictive terms. To the extent that this commentary has prescriptive content, we think its exposition of the role of interpretive and explanatory commentary is inconsistent with the uses to which the Commission in practice has put such commentary and the command in § 1B1.7 that failure to follow interpretive and explanatory commentary could result in reversible error.

We now apply these principles to Amendment 433. We recognize that the exclusion of the felon-in-possession offense from the definition of "crime of violence" may not be compelled by the guideline text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not "plainly erroneous or inconsistent" with § 4B1.2, *Bowles* v. *Seminole Rock & Sand Co.*, *supra*, at 414. As a result, the commentary is a federal courts and in ruling that Amendment 433 is not of controlling weight. See Brief for United States 11–19. It suggests, however, that we should affirm the judgment on an alternative ground. It argues that petitioner's sentence conformed with the Guidelines Manual in effect when he was sentenced, *id.*, at 22–29, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the provisions in the Manual, *id.*, at 19–22. The Government claims that petitioner's only recourse is to file a motion in District Court for resentencing, pursuant to 18 U. S. C. § 3582(c)(2). Brief for United States 33–35. It notes that after the Court of Appeals denied rehearing in this case, the Sentencing Commission amended USSG § 1B1.10(d), p. s., to indicate that Amendment 433 may be given retroactive effect under § 3582(c)(2). See Amendment 469, USSG App. C, at 296 (Nov. 1992).

We decline to address this argument. In refusing to upset petitioner's sentence, the Court of Appeals did not consider the nonretroactivity theory here advanced by the Government; its refusal to vacate the sentence was based only on its view that commentary did not bind it. This issue, moreover, is not "fairly included" in the question we formulated in the grant of certiorari, see 506 U. S. ___ (1992). Cf. this Court's Rule 14.1(a). We leave the contentions of the parties on this aspect of the case to be addressed by the Court of Appeals on remand.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

WILLIAM MALLORY KENT, Jacksonville, Fla., for petitioner; PAUL J. LARKIN JR., Assistant to Solicitor General (WILLIAM C. BRYSON, Acting Sol. Gen., JOHN C. KEENEY, Acting Asst. Atty. Gen., and JOHN F. DE PUE, Justice Dept. atty., on the briefs) for respondent.

No. 91-1043

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL., PETITIONERS *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 91-1043. Argued November 2, 1992—Decided May 3, 1993

Although those who petition government for redress are generally immune from antitrust liability, *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover ... an attempt to interfere directly" with a competitor's business relationships, *id.*, at 144. Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), which held copyrights to the motion pictures

had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs.

it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Ibid.*

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F. 2d 1525 (CA9 1991). After rejecting PRE's other allegations of anticompetitive conduct, see *id.*, at 1528–1529,[2] the court focused on PRE's contention that the copyright action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either "'misrepresentations . . . in the adjudicatory process'" or the pursuit of "'a pattern of baseless, repetitive claims'" instituted "'without probable cause, and regardless of the merits.'" *Id.*, at 1529 (quoting *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513, 512 (1972)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." 944 F. 2d, at 1530. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" because "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine." *Id.*, at 1531, 1532. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id.*, at 1533. It accordingly rejected PRE's request for further discovery on Columbia's intent.

The courts of appeals have defined "sham" in inconsistent and contradictory ways.[3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 508, n. 10 (1988). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

II

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite . . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under which either "indifference to . . . outcome," *ibid.*, or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability under the sham exception. We decline PRE's invitation.

Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.*, at 136. Accord, *Mine Workers* v. *Pennington*, 381 U. S. 657, 669 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U. S., at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. *Id.*, at 138.

Noerr, however, withheld immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.*, at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), we elaborated on *Noerr* in two relevant respects. First, we extended *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U. S., at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings

[2] The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. 944 F. 2d, at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia's other allegedly anticompetitive acts. *Id.*, at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962).

[3] Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co.* v. *Mapco, Inc.*, 958 F. 2d 1552, 1560, and n. 12 (CA11 1992); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F. 2d 785, 809–812 (CA2 1983), cert. denied, 464 U. S. 1073 (1984); *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F. 2d 1171, 1177 (CA10 1982); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.*, 214 U. S. App. D. C. 76, 85, 89, 663 F. 2d 253, 262, 266 (1981), cert. denied, 455 U. S. 928 (1982). Still other courts have held that successful litigation by definition cannot be sham. See, *e. g.*, *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, 914 F. 2d 556, 564–565 (CA4 1990), cert. denied, 499 U. S. ___ (1991); *South Dakota* v. *Kansas City Southern Industries, Inc.*, 880 F. 2d 40, 54 (CA8 1989), cert. denied *sub nom. South Dakota* v. *Kansas City Southern R. Co.*, 493 U. S. 1023 (1990); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154, 161 (CA3 1984).

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc.* v. *Smith*, 797 F. 2d 313, 318 (1986) (emphasis added), cert. denied, 479 U. S. 1035 (1987). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F. 2d 466, 472 (1982), cert. denied, 461 U. S. 958 (1983). Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.*, 822 F. 2d 518, 528 (1987), cert. denied *sub nom. Union Pacific R. Co.* v. *Energy Transportation Systems, Inc.*, 484 U. S. 1007 (1988).

and actions . . . with or without probable cause, and regardless of the merits of the cases." *Id.*, at 512 (internal quotation marks omitted). We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.[4]

Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U. S., at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the . . . campaign to influence governmental action." *Id.*, at 143. We reasoned that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.*, at 139. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U. S., at 670.

Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U. S., at 513. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decisionmaking process." *Id.*, at 512.

Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 380 (1973) (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 500, n. 4 (1988). And we have explicitly observed that a successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." *Id.*, at 502. See also *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623, 645 (1977) (BLACKMUN, J., concurring in result) (describing a successful lawsuit as a "genuine attemp[t] to use the . . . adjudicative process legitimately" rather than "'a pattern of baseless, repetitive claims'"). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 424 (1990); *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913–914 (1982). Cf. *Vendo*, *supra*, at 635–636, n. 6, 639, n. 9 (plurality opinion of REHNQUIST, J.); *id.*, at 644, n., 645 (BLACKMUN, J., concurring in result). Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 743–744 (1983). Our decisions therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Noerr*, 365 U. S., at 140, quoted in *Pennington*, *supra*, at 669.

Our most recent applications of *Noerr* immunity further demonstrate that neither *Noerr* immunity nor its sham exception turns on subjective intent alone. In *Allied Tube*, 486 U. S., at 503, and *FTC* v. *Trial Lawyers*, *supra*, at 424, 427, and n. 11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to seek favorable legislation or to influence governmental action. Cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 101, n. 23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice"). In *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. ___ (1991), we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's "purposes were to delay [the plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora." *Id.*, at ___ (slip op., at 15) (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a 'sham.'" *Ibid.* Accord, *id.*, at ___ (STEVENS, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real 'intelligible guidance.'" *Allied Tube*, *supra*, at 508, n. 10.

III

We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.[5] Only if challenged litigation is objectively

[4] *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive . . . competitors of meaningful access to the . . . courts." 404 U. S., at 512. See also *id.*, at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts"); *id.*, at 518 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

[5] A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the

meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr*, *supra*, at 144 (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni*, 499 U. S., at ___ (slip op., at 14) (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See *Omni*, *supra*, at ___; *Allied Tube*, *supra*, at 500, n. 4; *Noerr*, *supra*, at 144; *Vendo Co.* v. *Lektro-Vend Corp.*, *supra*, at 645 (BLACKMUN, J., concurring in result). The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt

proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings,[7] requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194 (1879); *Wyatt* v. *Cole*, 504 U. S. ___, ___ (1992) (REHNQUIST, C. J., dissenting); T. Cooley, Law of Torts *181. Cf. *Wheeler* v. *Nesbitt*, 24 How. 544, 549–550 (1861) (related tort for malicious prosecution of criminal charges). Probable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication" (internal quotation marks omitted). *Hubbard* v. *Beatty & Hyde, Inc.*, 343 Mass. 258, 262, 178 N. E. 2d 485, 488 (1961); Restatement (Second) of Torts §675, Comment *e*, pp. 454–455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 144, 149 (1887); *Wheeler*, *supra*, at 551; *Liberty Loan Corp. of Gadsden* v. *Mizell*, 410 So. 2d 45, 48 (Ala. 1982). Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. *Stewart*, *supra*, at 194; *Wheeler*, *supra*, at 551; 2 C. Addison, Law of Torts §1, ¶853, pp. 67–68 (1876); T. Cooley, *supra*, at *184. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect

§102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984).

When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154 (1984); *Columbia Pictures Industries, Inc.* v. *Aveco, Inc.*, 612 F. Supp. 315 (MD Pa. 1985), aff'd, 800 F. 2d 59 (CA3 1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 USPQ, at 746; 866 F. 2d, at 280–281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, Copyright: Principles, Law and Practice §5.7.2.2, pp. 616–619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright §8.14[C][3], pp. 8–168 to 8–173 (1992). The Seventh Circuit expressly U. S. 958 (1983). Such matters concern Columbia's economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," Fed. Rule Civ. Proc. 56(c), and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

So ordered.

JUSTICE SOUTER, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante*, at 10. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable cause," a standard which, as the Court explains it in this case, requires a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Ante*, at 13 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a

ante, at 7, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's

and this Court all agree that it was—neither the respondents' own measure of their chances of success nor an

third a collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly tried to put the plaintiff out of business.[7] In each of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington*, in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases—in which the Courts of Appeals did state that a successful lawsuit could be a sham—did not involve lobbying, but did contain much broader and more complicated allegations than petitioners presented below.[8] Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 379, n. 9 (1973); *Westmac, Inc.* v. *Smith*, 797 F. 2d 313, 322 (CA6 1986) (Merritt, C. J., dissenting). It is in more complex cases that courts have required a more sophisticated analysis—one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

"But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in